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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-602

THE TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

BLUE CROSS OF WESTERN PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Blue Cross of Western Pennsylvania, respectfully submits this brief in opposition to the captioned petition and urges that the petition be denied by this Court.

Statutes Involved

Petitioner omits from its statement of "Statutes Involved" two sections of the McCarran Act, 15 U.S.C. §§1011 and 1012(a):

> §1011. "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to

impose any barrier to the regulation or taxation of such business by the several States."

§1012(a). "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Petitioner also omits the Pennsylvania statute which, relevant to the McCarran Act exemption, specifically subjects the contract between Respondent and Western Pennsylvania hospitals—characterized by Petitioner as "the center of contention in this case" (Pet. 2)*—to regulation by the Commonwealth's Insurance Department, namely, Section 1404 of the Pennsylvania Nonprofit Hospital Plan Act, 40 P.S. § 1404 (recently reenacted without material change as 40 P.S. § 6124):

"The rates charged to subscribers by nonprofit corporations, subject to the provisions of this act, all rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this act, all acquisition costs in connection with the solicitation of subscribers to such hospital plans, the reserves to be maintained by such corporations, the certificates issued by such corporations representing their subscribers' agreements, and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department. . . ."

* "Pet." references are to the petition for writ of certiorari; "Pet. App." references are to the appendices (A or B) of the petition; "App." references are to the printed Appendix in the court of appeals; "PX" references are to Plaintiff's (Travelers) Exhibits; and "DX" references are to Defendant's (Blue Cross) Exhibits.

Question Presented

The "Questions Presented" by Petitioner bear no relation to the facts of record or to the decisions of the courts below. Indeed, Petitioner not merely ignores the factual findings and legal conclusions below, but mischaracterizes them as well.

The only point which, in Respondent's view, conceivably warrants formal Argument in this brief is the narrow point, properly rejected below:

> **whether, as the court of appeals put it, given a comprehensive scheme of "aggressive" state insurance regulation, in order "to exempt conduct from the federal antitrust laws [under McCarran], state regulation must [also] parallel the Sherman Act." (Pet. App. A 5a-6a, n.10).**

On this point, there is no room for doubt that this case does not warrant review by this Court in light of the Congressional purpose underlying the McCarran Act, the decisions of this Court, and various courts of appeals and district courts, as well as the decisions below which carefully applied the law to the specific facts in evidence.

Moreover, Petitioner, mindful that in order to prevail it must also induce this Court to hear and then reverse the holdings below that, even absent McCarran, Respondent has not violated the Sherman Act, seeks (through its "Questions" 2 and 3, Pet. 3-4) nothing less than a full review and rejection by this Court of the facts found below—which findings, as Respondent's Statement of the Case herein will make clear, ineluctably led the courts below to their correct decision. Similarly, Petitioner's Fourteenth Amendment "Question" (Pet. 4, Question 4), premised on its mischaracterization of the facts, is proffered by Peti-

tioner for a fact resolution by this Court contrary to those found below.

Statement of the Case

The petition seeks review of a unanimous judgment of the court of appeals affirming the decision and order of the district court dismissing the antitrust complaint of Petitioner, The Travelers Insurance Company ("Travelers"), one of the nation's largest commercial insurance companies, against Respondent, Blue Cross of Western Pennsylvania ("Blue Cross"), one of the five state-regulated, nonprofit hospitalization insurance plans in Pennsylvania.

The focal point of Travelers' case was the contract between Blue Cross and 101 primarily nonprofit hospitals in Western Pennsylvania, whereby hospitals are guaranteed payment from Blue Cross of their costs of providing care to Blue Cross insured patients. (Pet. App. B 13a).* Travelers alleged and still maintains here that the contract's cost-based formula of payment was the keystone of Blue Cross' monopolization of, or attempt or conspiracy to monopolize, the hospitalization insurance business in Western Pennsylvania, and rendered the contract itself in unreasonable restraint of trade, in violation of Section 2 and Section 1, respectively, of the Sherman Act.

The courts below, in holding that state regulation of the contract exempted Blue Cross from antitrust attack, and that, even absent McCarran, Blue Cross had not violated the antitrust laws (Pet. App. A 2a; Pet. App. B 23a), had the benefit of an enormous body of facts developed during a "lengthy" and "comprehensive non-jury trial" (Pet. App. A2a; Pet. App. B 12a). That trial: traced the origins and

* Similar cost reimbursement contracts are utilized by the other Pennsylvania Blue Cross plans, and by the Federal Government and the Commonwealth of Pennsylvania under Medicare and Medicaid programs, respectively (App. 637a-638a, 848a).

functioning of Blue Cross as a "community service [institution] participating in the Commonwealth of Pennsylvania's plan for the efficient maintenance of an essential community health service at the lowest possible cost to the public" (Pet. App. B 20a); and "compared" the "methods employed and the plan administered by Blue Cross . . . with the hospitalization insurance product of Travelers and 300 other commercial carriers" operating in Western Pennsylvania (Pet. App. B 22a). The conclusion drawn by the courts below was that "the completeness of [Blue Cross'] coverage" made it "considerably more attractive to consumers" and gave it "public acceptance," which led to its "superior competitive position" and "success" in providing "hospitalization insurance for 51% of the population of this area." (Pet. App. B 23a; Pet. App. A 2a, 10a).

A. Blue Cross

Prior to the formation of Blue Cross in 1937, "commercial insurance companies were doing virtually nothing in providing hospital care protection to the citizens of Pennsylvania through private insurance" (DX-494; App. 538a). This resulted in a crisis for the bulk of Pennsylvania's citizens who were unable to pay for required hospital care, and for the hospitals which were experiencing serious financial deficits (DX-494; DX-1 at 5; DX-292 at 757-764). "[T]o meet [this] public health problem" (Pet. App. B 14a) the Pennsylvania Legislature enacted the Nonprofit Hospital Plan Act of 1937 (40 P.S. § 1401 *et seq.*) "authorizing the creation of nonprofit hospital plans, now known as Blue Cross plans, which through contracts with hospitals would provide hospital services for subscribers and guarantee the payment of their hospital care." (DX-494; Pet. App. B 15a).

Built into the Nonprofit Hospital Plan Act is a system of comprehensive regulation of all material aspects of the

operations of Blue Cross by the Pennsylvania Insurance Department (Pet. App. B 14a-15a). The testimony of the current Insurance Commissioner, Herbert S. Denenberg, and two former Commissioners, as well as the extensive documentary record of more than three decades of Insurance Department regulation,* made clear that the Department has pursued as its regulatory goals that which the Commonwealth sought to achieve through the enactment of the Nonprofit Hospital Plan Act, i.e., assuring availability of the highest quality, most comprehensive health care at the lowest possible cost; and, further, that the Insurance Department has translated these goals, "in strict conformity with" the Act, into a consistent pattern of regulation and control over the operations of Blue Cross, with particular emphasis on subscriber rates and the manner of Blue Cross reimbursement of hospitals which directly affects such rates (Pet. App. B 14a, 17a-21a; Pet. App. A 6a).

The record is likewise crystal clear that Blue Cross has served a community health function. Initially, it makes available to all segments of the Western Pennsylvania community, good risks and bad risks alike, full service benefit insurance coverage at the lowest possible cost (Pet. App. A 9a-10a; App. 452a, 542a-543a; DX-1 at 8). Thus, Blue Cross accepts an open-ended risk by guaranteeing payment for needed care regardless of how extensive and costly it might be, automatically including use of new medical techniques and equipment (Pet. App. A 10a; App. 544a, 760a-761a). While Blue Cross subscriber contracts vary as to the

* App. 761a *et seq.*, 659a *et seq.*, and 923a *et seq.;* DX-5 through DX-93; DX-98; DX-109; DX-173; DX-190; DX-192; DX-512, 513; DX-801, 802; DX-805, 806, 807.

specified number of days of coverage, the periods are so liberal that in more than nine cases out of ten all inpatient claims are covered in full (App. 544a).

Additionally, in Blue Cross' effort "to treat the whole community as a unit in need" (App. 452a), its rates are structured to bring the cost of comprehensive coverage within the means of the community—so that the burden is not borne entirely by any one segment, but rather is spread across as large a cross-section as possible. As a result, while the portion of each Blue Cross premium dollar paid out in hospital benefits has averaged between $.93 and $.95 overall, Blue Cross has paid out an average of $1.05 in benefits for every dollar of premiums received from its poor risk subscribers, enrolled as individuals or members of small groups (App. 548a, 551a). Over the period from 1960 through 1970, the subsidization of these poor risks has amounted to over $27,000,000 (Pet. App. A 3a, n.8; App. 700a-701a).

The means by which Blue Cross since 1937 has made such benefits available to the community, and at the same time placed hospitals in a stable financial condition, is through contracts with hospitals; and the means by which the Commonwealth seeks to accomplish its goals is through regulation of the hospital contract to ensure that it will bring about high quality care at the lowest possible cost to the public (App. 659a-678a, 767a-770a; DX-801, 802).

Thus, when Blue Cross and the hospitals conducted their "exhaustive negotiation" on a new contract, (Pet. App. B 20a) it had been "made abundantly clear" by the Insurance Department that the contract had to be based on hospital costs, limited by a cost control ceiling (Pet. App. B 18a-19a; Pet. App. A 6a),* and that *not* includible in the reimbursement formula were expenses not incurred by reason of ser-

* App. 675a-683a, 571a-573a, 593a-594a.

vices to Blue Cross patients, such as amounts attributable to free care and defaulting patients, or for new construction or capital expansion (Pet. App. B 19a; Pet. App. A 6a; App. 667a-668a, 774a-779a; DX-40 at 19; DX-98 at 4). "Within these guidelines" the parties arrived at a consensus that satisfied their "mutual needs and responsibilities . . . as community service institutions" (Pet. App. B 19a-20a). And the contract which resulted was approved by the Insurance Department (Pet. App. B 17a).

The chief advantage to hospitals is the contract's guarantee that the hospitals will be paid promptly their cost of providing care to Blue Cross subscribers for the duration of their contracts (App. 636a-637a).* This guarantee is particularly meaningful to hospitals because it is coupled with the assurance that Blue Cross' comprehensive service benefit coverage to subscribers will enable hospitals to recover their costs with respect to the full range of services necessary for patient care (App. 548a-549a). Further, since nearly all Blue Cross member hospitals are nonprofit institutions, they are guaranteed receiving from Blue Cross that which they only *hope* to receive from non-guaranteed patients, such as policyholders of commercial insurers or self-insured persons (App. 636a, 847a-848a). Hospitals recognize that such non-guaranteed patients do not always *pay* the amount *billed* and, therefore, the actual amount the hospitals receive therefrom does not equal the hospitals' *charges*, and may not even equal *cost* (App. 355a, 828a-829a). Thus the district court's finding that: "In order to

* As the court of appeals noted: "If a hospital refused to agree to the contract, Blue Cross would reimburse the hospital on a per diem basis by an amount insufficient to cover the hospital's costs. A hospital would have to make up any deficiency by charging the patient directly. We note that this procedure is typical of the indemnification plans offered by private insurance companies." Pet. App. A 7a, n.12.

cover their financial requirements not incurred by reason of services to Blue Cross subscribers—such as the cost of services to indigent and defaulting patients—the same hospitals charge policyholders of Travelers and other commercial carriers an average of 14% more for their services than they accept as full payment from Blue Cross." (Pet. App. B 13a; and see Pet. App. A 3a, 6a).

B. The Comparison Between Blue Cross and the Commercial Carriers

By Travelers' own admission, "Blue Cross at one time enjoyed a virtually complete monopoly, due to the simple fact that no commercial insurers were prepared to enter the field of hospitalization coverage" (App. 855a). Even as the decade of the 1940's came to a close, while commercial insurers had begun writing limited dollar indemnity policies, they were not interested in writing full service benefit coverage due to the open-ended nature of the risks involved; and they "were unwilling to take that risk" with respect to such coverage bargained for by large trade unions, who then turned to Blue Cross (App. 856a, 858a-861a, 902a, 914a-917a).

Notwithstanding consumer preference for full service benefit coverage, and that prospective purchasers recognize "[f]ull service benefits are definitely an advantage to an employee . . .", Travelers and the commercials continue to be reluctant to duplicate and underwrite Blue Cross-type full service coverage; for it is Travelers' view that the "better principle"—for Travelers—is policies with "dollar limits" (App. 168a-169a, 861a, 902a, 914a-917a).

This principle is not "better" for the many citizens of Western Pennsylvania who are simply unable to obtain full service coverage from Travelers and other commercials

who consistently refuse to provide such coverage to individuals, and members of small groups, and even discourage full service coverage for larger groups (App. 948a, 83a, 131a, 902a, 914a-917a). As the court of appeals noted: "It appears that Blue Cross is still alone in offering this arrangement to small groups and to high-risk individuals" (Pet. App. A 10a, n.15). Accordingly, Blue Cross' offer of full service benefit coverage to all segments of the Western Pennsylvania community has attracted hundreds of thousands of people who could not get such coverage elsewhere.*

In those instances where the consumer has a free choice, Blue Cross' reputation is now such that Travelers' own witness

> "could say without fear of contradiction that if we are talking about a bargaining group of employees and they were given a choice, again, especially in this particular area, I refer to Western Pennsylvania, the bargaining employee would opt for Blue Cross." (App. 111a).

In addition, the underwriting policies of the commercials have not been in the best interests of the hospitals. Commercial coverage has traditionally been so inadequate that another Travelers witness observed that hospitals do not even consider individually insured patients with commercial coverage as being insured at all since the hospitals have great difficulty in collecting the bills rendered to such patients (App. 355a). Thus, beyond the fact that Travelers and other commercials have not sought to contract

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* Approximately 21% of Blue Cross subscribers (almost half a million people) are insured as individuals (PX-2) and over 72% of Blue Cross' groups are made up of less than 15 persons (DX-544(2)).

with hospitals,* even if they had, any guarantee of payment would have had little meaning due to their restrictive underwriting practices (App. 362a-364a, 814a-818a). And on this point, the court of appeals noted that Travelers' own evidence

> "suggests not that Travelers was unable to obtain any price reduction from hospitals, but rather that Travelers assumed its inability to do so and, therefore, did not press the matter. Moreover, it is not clear that Travelers was willing to adopt a full-cost reimbursement scheme comparable to that of Blue Cross (as opposed to the typical indemnification arrangement) as a quid pro quo." (Pet. App. A 9a, n.13).

It was against this background that the courts below denied Travelers the mandate it sought which would displace the regulatory policies of Pennsylvania. For, as Insurance Commissioner Denenberg pointed out in his testimony, a holding in support of the position urged by Travelers would substantially impair the Commonwealth's ability to effectively regulate Blue Cross and control spiralling hospital costs, and prevent the state from realizing the basic public policy goals underlying its regulatory scheme (App. 762a-763a).

C. The Decisions Below

The courts below not only applied the McCarran exemption to Blue Cross' challenged activity (treated in the Argument herein), but went on to decide, as the court of appeals put it: "Even if the McCarran-Ferguson Act were inapplicable and Blue Cross was subject to antitrust scru-

* App. 861a-863a, 936a, 945a, 814a-818a; save for Metropolitan, which entered into contracts with two hospitals in Western Pennsylvania (App. 117a-118a).

tiny, we agree with the district court that Blue Cross could withstand such scrutiny." (Pet. App. A 7a).

1. *Section 2 of the Sherman Act*

With respect to Travelers' allegations of monopolization or attempted monopolization, the district court initially rejected Travelers' contention that Blue Cross possessed, or could obtain, the requisite "monopoly power"—the "power to control prices or exclude competition." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). The district court found not only that "300 other commercial carriers" had entered the Western Pennsylvania hospitalization insurance market (Pet. App. B 22a)* but that Blue Cross—caught in a squeeze between Insurance Department regulatory pressure to keep subscriber rates as low as possible and rising hospital costs pressuring such rates upward**—"is not a monopolist, for it not only lacks control over the rate-making effects normally incident to lawful competition, but it is without power to establish its own rates." (Pet. App. B 23a).

On this score, the court of appeals, while it said "we have not reached the determination of whether Blue Cross possesses enough market power*** to have 'monopoly power',"

* That their entry has been successful is evidenced by their coverage of many of the largest accounts in the area such as Alcoa, Allegheny Ludlum, Republic Steel, Westinghouse and others (App. 101a-103a, 176a-181a, 73a-75a).

** App. 767a, 555a, 664a; DX-62; DX-68; DX-192.

*** Contrary to Petitioner's assertions here and below, neither the district court nor the court of appeals found Blue Cross to have a "market share" of 62%. The district court referred only to the percent of "hospital days of service" (Pet. App. B 12a-13a), or "patient days" as the court of appeals put it (Pet. App. A 2a), received by Blue Cross subscribers on the one hand and commercially insured persons on the other. The court of appeals noted that "There were also patients who qualified for Medicare or Medic-

(Pet. App. A 7a), made the following statements (at Pet. App. A 8a, 9a): "the size of its competitors does not give Blue Cross the freedom to conduct other than fair competition for business;" and "there is no reason to suppose that, even if commercial insurers such as Travelers were currently unable to compete with Blue Cross,* they could not immediately re-enter the hospitalization insurance business if it became profitable to do so."

Further, in regard to Sherman 2's requisite of *willful* acquisition or maintenance of monopoly power, or *specific intent* to acquire it, *as distinguished from* growth or de-

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aid, etc. or who were not covered by any form of reimbursement . . . ." (Pet. App. A 2a, n.6). Complete "patient day" data, reflected in undisputed documentary evidence, discloses that Blue Cross patients received less than ⅓ of the hospital days of service for *all* types of patients (Exhibit C-1 of DX-540, 541 and 542a). See also *Hiland Dairy, Inc.* v. *Kroger Company*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

* Contrary to Travelers' assertion (Pet. 7) that it is "virtually impossible" for Travelers and the commercials to compete against Blue Cross, the commercials can, when they choose, effectively compete.

Unlike Blue Cross, which is a specialist in hospitalization, Travelers and the commercials have the advantages of underwriting and selling a package of Accident and Health benefits (of which hospitalization is but one segment) as well as other coverages. Such advantages include retention savings reflected in a lower combined rate on the package and the ability to cross apply funds within a combined rated package—thereby, the commercials seldom have to meet a Blue Cross rate head-on, and can insulate themselves from competition from such a single line carrier. Thus, the commercials many times have quoted rates lower than Blue Cross; at times the rates have been comparable; and even where Blue Cross' rates were lower, the commercials have retained or obtained the coverage of many large accounts (App. 159a, 163a-164a, 171a, 176a-181a, 468a).

Indeed, there was proved no net loss of business by Travelers as a direct result of Blue Cross' hospital cost reimbursement. Whereas Travelers has lost two accounts to Blue Cross, Blue Cross has lost two to Travelers (56a, 86a-87a, 893a-894a, 896a, 899a; DX-350 at 1; DX-297; DX-309).

velopment as a consequence of a superior product, business acumen, or historic accident,* the district court found that the "overriding motive" and "manifestly legitimate purpose" of Blue Cross (and the hospitals) in arriving at the hospital contract was implementation of the "Commonwealth . . . plan for the efficient maintenance of an essential community health service," under state regulation, at "the lowest possible cost to the public." (Pet. App. B 20a-21a). And the district court further found such motive and purpose to be untainted by any boycott, coercion, intimidation or restraint of trade (Pet. App. B 21a-23a). Rather, the district court found that, in *comparing* what Blue Cross offers the community with what Travelers and the commercials offer, "whatever share of the hospitalization insurance market Blue Cross enjoys is the result of public acceptance," and that the resulting "[c]ommunity attraction" to Blue Cross and its "economic appeal" lent "credence to Blue Cross' 'thrust upon' defense. . . ." (Pet. App. B 23a).

The court of appeals "[agreed] with the district court's determination that Blue Cross achieved its present status in a permissible manner," (Pet. App. A 9a), stating:

> "The district court found, on ample evidence, that Blue Cross owes its success to the completeness of its coverage. From the time of its organization in the late 1930's, Blue Cross has reimbursed hospitals for all covered services rendered its subscribers. Private companies, on the other hand, have, until relatively recently, provided only that their policyholders would be indemnified up to a set dollar ceiling. Blue Cross thus has exposed itself to considerably greater risk because of the

* *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 784-85 (1946).

> possibility that treatment would be extensive and because of the probability that hospital costs would rise. By shouldering the risk, Blue Cross has made itself considerably more attractive to consumers. The antitrust laws were not intended to condemn such conduct." (Pet. App. A 10a).

And thus, the court of appeals, quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), concluded that Blue Cross' arrangement with hospitals did *not* constitute "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'." (Pet. App. A 7a).

2. *Section 1 of the Sherman Act*

Both courts below, contrary to Petitioner's assertions, properly applied the "rule of reason" to the situation here. The court of appeals stated: "as the district court indicated, it must be carefully looked at on its own facts, in order to reveal whether any restraint of trade it causes is 'reasonable.' *See Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4-5 (1958); *cf. Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918)." (Pet. App. A 8a). This is precisely what the district court did in reaching its conclusions that "Travelers has not met its burden with respect to the issues of . . . restraint of trade" (Pet. App. B 22a), and that there was an absence of "any artificial restraint-of-trade practices" on Blue Cross' part (Pet. App. B 23a).

Following the path set down by this Court in *Chicago Board of Trade*, the district court "tested for unreasonable-restraint-of-trade characteristics" the "contract itself . . . as well as the setting in which it originated" (Pet. App. B

17a), which has been detailed above; and weighed also that Blue Cross never tried to influence the relationship between hospitals and Travelers or other commercials, "much less any inducement to the hospitals not to deal with Travelers" and the commercials (Pet. App. B 22a-23a)—a finding which, as the court of appeals noted, "Travelers has not challenged" (Pet. App. A 6a-7a).

In this connection, the court of appeals also noted that:

> "In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible. This pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as Travelers. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned." (Pet. App. A 8a).

And in distinguishing, "both as to practices involved" and their "context", the case relied upon by Petitioner below, as well as here, *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949), the court of appeals observed:

> "In addition to its aggressive bargaining over price, A. & P. was also found to exert pressure on suppliers either not to deal or to alter their dealings with A. & P.'s competitors. No comparable conduct was shown here. In fact, the evidence does not support the proposition that Travelers or other companies could not have achieved some price reductions. Moreover, A. & P. was found to have engaged on several occasions in preda-

tory pricing. . . . Here, in contrast, there was no evidence of predatory pricing." (Pet. App. A 8a-9a).*

3. *The Fourteenth Amendment*

As to this claim, the court of appeals said it had "little merit" (Pet. App. A 11a) and could "be disposed of quickly" (Pet. App. A 10a), essentially on any one of three grounds. *First,* "it is questionable whether [Travelers'] . . . belated presentation properly raised the issue before the district court so as to make consideration here proper. See *Andrews* v. *Chemical Carriers, Inc.,* 457 F.2d 636 (3d Cir. 1972)." (Pet. App. A 11a). *Second,* in view of the simple fact that Blue Cross had never been accorded a favored position—rather, it has had to assume, under state supervision, a heavy responsibility to the community (as well as to the hospitals) which Travelers and the commercials have opted not to assume—the court of appeals stated: "In view of our holding that, independent of the McCarran-Ferguson Act, the antitrust laws were not violated, the state of Pennsylvania has not denied Travelers equal treatment in violation of the Fourteenth Amendment." *(Id.)*

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* It was in this light that the courts below refused to accept Travelers' premise which, disregarding these relevant facts, theorized that because Blue Cross has a cost reimbursement contract and Travelers is at a "substantial price disadvantage," *ipso facto* the contract is in unreasonable restraint of trade. This argument, beyond the blinders it places on the entire "setting," wars with the facts that not only has Blue Cross done nothing to prevent any commercial carrier from contracting with hospitals, but that Travelers has not even seriously sought to contract with them on any basis.

Beyond that, contrary to Travelers' representations to this Court, *neither* of the courts below found that the contract's effect upon competition was "detrimental" (Pet. 18) or had a "suppressive effect upon competition" (Pet. 19). Further, contrary to the findings and record below is Travelers' assertion here (Pet. 21) that "there is no reasonable justification" for the alleged "discount" flowing from the hospital contract.

Finally, **in response to Travelers' simplistic approach which (contrary to the clear expression of reasonable legislative purpose underpinning the Nonprofit Hospital Plan Act, and its administration)** ***assumed*** **an unconstitutional classification** ***without*** **the indispensible** ***proof*** **of its arbitrariness, the court of appeals concluded: "even if McCarran-Ferguson Act protection were necessary to Blue Cross, the facts do not support the proposition that Pennsylvania's regulation of the contract between Blue Cross and the hospitals was without rational purpose,** *see,* **e.g.,** *James* **v.** *Strange,* **407 U.S. 128 (1972)."** *(Id.)**

ARGUMENT—The McCarran Act Question

Contrary to Petitioner's assertions, this case presents no novel and significant question warranting review by this Court, nor does the decision below conflict with any applicable decision of this Court or of any court of appeals or district court. Rather, the McCarran Act "Question" was decided below consistent with the Act, the decisions of this Court and of other federal courts on the strength of the unique set of facts established in the massive record of this case.

I.

As the district court observed, Travelers' "target is the heart of the Blue Cross plan—the hospital contract." (Pet. App. B 17a). But, the Commonwealth, by statute, has specifically subjected that very "target" to regulation, vesting in the Insurance Department the power to regulate "rates

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* See also *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *Morey* v. *Doud,* 354 U.S. 457 (1957); *Hoopeston Canning Co.* v. *Cullen,* 318 U.S. 313 (1943); *German Alliance Ins. Co.* v. *Lewis,* 233 U.S. 389 (1914); *Lindsley* v. *Natural Carbonic Gas Company,* 220 U.S. 61 (1911).

charged to subscribers by nonprofit corporations . . . rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this act, . . . and any and all contracts entered into by any such corporation with any hospital. . . ." 40 P.S. § 1404.*

Under the statute, Pennsylvania's Insurance Department, over the years and to this day, has consistently sought as its major regulatory goals: to assure that Blue Cross provides the highest quality, most comprehensive health care coverage at the lowest reasonable price; and to bring about a hospital contract that, in turn, guarantees the delivery of such care at the lowest reasonable cost. These goals have been developed into a consistent pattern of regulatory direction and control over Blue Cross, particularly its contractual relationship with hospitals, subscriber rates and benefits. This regulation has not only taken the form of hearings, approvals or disapprovals, but also of a vigorous program of policymaking and action, made known not only to Blue Cross, but to the community at large, including the hospitals.**

It was against this background—in contrast to Petitioner's characterization that the hospital contract is subject only to the "general" supervision of the Insurance Commissioner—that the district court, in holding Blue Cross entitled to the McCarran exemption, found: "the activities of Blue Cross in all respects material to this case, including

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* Failure to comply with the regulatory scheme contained in the Act or with any order of the Insurance Department made pursuant to the Act carries with it the risk of criminal penalties. 40 P.S. § 1409 (reenacted as 40 P.S. § 6105).

** Pet. App. B 18a-21a; App. 382a-383a, 450a-452a, 541a-542a, 544a-546a, 554a-565a, 572a-573a, 588a-591a, 593a-594a, 600a-604a, 610a, 659a-684a, 761a-780a, 795a-802a, 929a-931a; DX-4, 5; DX-37; DX-40; DX-43; DX-49; DX-68; DX-68a; DX-93; DX-98; DX-109; DX-113; DX-192; DX-510, 511, 512, 513; DX-801, 802.

the terms of the contract under attack, are regulated and directed by the Insurance Department . . . in strict conformity with the provisions of the Non-profit Hospital Plan Act. . . ." (Pet. App. B 14a); and "all Blue Cross activities of which Travelers complains occur within the area of state-regulated insurance business. . . ." (Pet. App. B 16a). And as the court of appeals stated, after quoting the relevant provisions of the Nonprofit Hospital Plan Act:

> "One recent case suggests that the mere existence of such a scheme of regulation, even if ineffective and unenforced, is sufficient to invoke the McCarran-Ferguson Act. *Ohio AFL-CIO* v. *Insurance Rating Board*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). However that may be, the record here shows aggressive state regulation. In fact, as the district court found, the features of the contract which Travelers finds objectionable were mandated by Insurance Department guidelines designed to encourage high quality care at reasonable cost." (Pet. App. A 6a).

Such findings, underlying the decisions below, as to a specific state statutory scheme of regulation of a specific practice of a Pennsylvania Blue Cross plan, and aggressive administrative enforcement by Pennsylvania's Insurance Department, further belie Petitioner's assertions of the nationwide impact which the decisions below would have on the multitude of imagined activities by "all insurance companies." (Pet. 3).

II.

Petitioner, unable to contest the fact of comprehensive regulation, sought below, as it does here, to superimpose upon McCarran the wholly unsupportable requirement that it applies only if state regulation is clothed in the garb of

antitrust enforcement. In response, the court of appeals stated:

> "We reject Travelers' argument that, to exempt conduct from the federal antitrust laws, state regulation must parallel the Sherman Act. Had Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself. Moreover, that Congress intended to allow the states to regulate insurance on the basis of factors other than competition is conclusively demonstrated by the McCarran-Ferguson Act's immunization of rate-fixing." (Pet. App. A. 5a-6a, n.10).

This rejected argument of Petitioner finds no support in the law; and none of the cases cited by Petitioner (Pet. 14-17) so hold.* Rather, in those cases, the courts deter-

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* Of the 9 McCarran cases cited at Pet. 14-15, only 4 even mention the *form* of regulation: In *Professional and Business Men's Life Ins. Co.* v. *Bankers Life Co.*, 163 F.Supp. 274 (D.Mont. 1958), the question of whether McCarran requires antitrust-type regulation was not even at issue, for plaintiff there conceded that the exemption would apply if the State of Montana provided for antitrust-type regulation of the life insurance business. The court found such regulation present and dismissed the complaint on the basis of the concession. *Id.* at 278-79.

In *Miley* v. *John Hancock Mut. Life Ins. Co.*, 148 F.Supp. 299, 302 (D.Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957), the court held the exemption applicable where the state "provides a statutory scheme of [non-antitrust] regulation covering the very transaction complained of here." The fact that the state also had a statute regulating unfair methods of competition in the insurance business was only "an additional ground" for exempting "the transaction" under McCarran. *Id.*

In *United States* v. *Chicago Title and Trust Co.*, 242 F.Supp. 56 (N.D.Ill. 1965), under attack was a corporate acquisition involving competing insurance companies actively doing business in many states. The key to the case is that there simply was "no Missouri statute or regulation regulating the acquisition by a foreign title insurance company [Chicago Title and Trust] of the stock of a domestic title insurance company [Kansas City Title]." *Id.* at 59. Beyond that, were the case decided today, the teachings of *S.E.C.*

mined whether the substantive *activity* under attack, *not* the competitive *effect* thereof, was regulated by the state; and thus, not determinative was the antitrust form of complaint, nor the form the regulation took.

A federal court's path in rejecting Travelers' argument is guided by the basic purpose of the Act to stay the federal hand. As Senator Ferguson, the co-sponsor of the bill that became the McCarran-Ferguson Act, explained:

> "under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we attempted to do." 91 Cong. Rec. 1481 (1945).

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v. *National Securities, Inc.*, 393 U.S. 453 (1969), would expose the acquisition under attack as a purely corporate activity basically unrelated to the "business of insurance."

And in *Sanborn* v. *Palm*, 336 F. Supp. 222 (S.D. Tex. 1971), involving an alleged tying agreement, the court, without referring to or negating the significance of state insurance regulation, if any, immediately seized on the Texas antitrust statutes as covering the alleged activity, and concluded that McCarran "deprived" the court "of Sherman Act jurisdiction." *Id.* at 228.

Similarly, the *Zachman, Sears, Roebuck,* and *Atlantic & Pacific Insurance* cases cited by Petitioner (Pet. 16-17) do not hold, as Petitioner contends, that McCarran requires "a state regulatory statute to . . . give a private right of action to persons injured. . . ." (Pet. 16). It should be noted that Travelers' remedy was to challenge the Insurance Commissioner's action in state court, a step which Travelers never took; nor did Travelers ever register any complaint of Blue Cross activity with the Insurance Department, or seek to participate in any Insurance Department hearing on hospital reimbursement.

Thus, soon after the McCarran Act's passage, this Court, in *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 429-30 (1948), reviewed the relevant legislative history, and found that:

> *"Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating . . . the business of insurance. . . .*
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and *its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.*" (Emphasis added).

Consequently, this Court concluded in *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 68-69 (1959):

> "We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of 'insurance,' they speak with the authority of a long tradition. For the regulation of 'insurance,' though within the ambit of federal power . . . has traditionally been under the control of the States."

Accordingly, the lower courts have held that:

> **"The McCarran-Ferguson Act does not prescribe a specific form of regulation to be adopted by the states. It is enough that the state should generally regulate the business of insurance by providing general standards of conduct and providing procedures for effectuating those standards. . . . To satisfy the requirements of the McCarran-Ferguson Act, state procedure need not be what plaintiff, or the courts, think is the wisest or the most effective type of regulation." *Fleming* v. *Travelers Indemnity Co.*, 324 F.Supp. 1404, 1406 (D.Mass. 1971).**

And,

> **"Under the terms of the Act, only when a state has not acted, would federal legislation become effective." *Hamilton Life Insurance Company* v. *Republic National Life Insurance Company*, 408 F.2d 606, 611 (2d Cir. 1969).**

Under McCarran, then, unlike instances where a court must divine the scope of *implied* exemption and attempt to strike a balance between federal antitrust interests and non-antitrust regulatory concerns (in the cases relied upon by Travelers, Pet. 16, such as *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-61 (1963)), we deal here with a clear-cut case of Congress *expressly* staying the federal antitrust hand in favor of state regulatory policies over the business of insurance. And certainly McCarran must apply here, as in *Miley* v. *John Hancock Mutual Life Insurance Company*, 148 F.Supp. 299, 302 (D.Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957), where there is "a statutory scheme of regulation covering the very transaction complained of. . . . [W]hat was done

here by the defendants . . . was . . . in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided that the Sherman Act shall not apply."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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